Coal Age Service Corporation *and* International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 483, AFL–CIO. Cases 14–CA–21090, 14–CA–21347, 14–CA–21461, and 14–CA–21612

September 30, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On November 19, 1992, Administrative Law Judge Harold Bernard Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed limited exceptions and an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions to the extent consistent with this decision, and to adopt the recommended Order as modified.

1. The judge found, inter alia, that the Respondent violated Section 8(a)(5) of the Act by failing to bargain in good faith with the Union during the course of the parties' negotiations between May 16, 1991, and February 17, 1992. The Respondent has excepted. For the reasons that follow, we agree with the judge that the Respondent engaged in bad-faith bargaining in violation of Section 8(a)(5) of the Act.

The parties had engaged in extensive bargaining from May 1988 through April 1990. The Respondent sought concessions from the Union. The Board found that the Respondent bargained in bad faith and committed a variety of other unfair labor practices during that time period. *Coal Age Service Corp*.[1] The finding of bad-faith bargaining was based, in part, on the Respondent's failure to document its claim that its competitors' labor costs were lower than those of the Respondent.

Subsequent to the the Board's Order, the parties resumed bargaining. The Respondent continued to insist that it needed wage-and-benefit concessions from the Union in order to remain competitive with companies in the area. Prompted by what the Respondent's president, Earl Willis, conceded was the need ''to justify the concessions [we] were asking for at the bargaining table,'' in this round of negotiations the Respondent provided the Union with a so-called wage-and-benefit ''survey'' listing the names of 10 companies on one side of the paper, and wage-and-benefit data on the other side. According to this ''survey,'' the Respondent appeared to have the highest wage-and-benefit costs.

Willis testified, however, that he was not fully familiar with the work these companies did nor was he sure that he regularly bids against them.[2] Willis also admitted that he made no attempt to determine the extent to which the companies surveyed were true competitors or whether the Respondent was actually losing work to them. Furthermore, Willis testified that, in compiling the survey, he inquired only about the companies' lowest and highest wage rates. Willis had no information on how many employees were at any given company, what classifications of employees existed, or how many employees were paid at the varying wage rates within a company.

Based on Willis' own testimony, the conclusion is inescapable that the Respondent did not make a good-faith effort to investigate the wages and benefits received by employees in comparable classifications employed by companies that could fairly be characterized as the Respondent's competitors. What the Respondent termed a ''survey'' was actually a sham manufactured to make it appear that the Respondent's uncompetitiveness claim had some basis in reality.

The Respondent's deceptive conduct did not concern some peripheral topic. Rather, as the judge found, the Respondent's ''list was the very core of the Respondent's position'' that it needed wage-and-benefit reductions in any contract with the Union in order to stay competitive. Introducing into the negotiations a sham survey on a crucial bargaining issue is simply not the conduct of an employer negotiating in good faith with a sincere intent to reach agreement.

It is well established that in determining whether a party is bargaining in bad faith, the Board looks to the totality of the circumstances in which the bargaining took place. E.g., *Hedaya Bros*., 277 NLRB 942, 944 (1985). Therefore, in considering its actions in this case, we also take into account the Respondent's acknowledged, contemporaneous unfair labor practices.[3] These ongoing unfair labor practices demonstrate the Respondent's desire to undermine the Union's support

[1] Cases 14–CA–20381, 14–CA–20535, and 14–CA–20621, JD–53–91 (March 1, 1991); adopted, absent exceptions, by the Board on April 11, 1991.

[2] Willis testified that he does not know whether he bids against the companies on the list. His only information on the point was that some of the companies have received contracts for jobs on which he has bid.

[3] The Respondent has not excepted to the judge's findings that: (1) it violated Sec. 8(a)(1), (3), and (4) of the Act by laying off employee Neal Heflin, a discriminatee in the prior case, because he supported the Union and testified at the prior Board proceeding; (2) it violated Sec. 8(a)(1), (3), and (4) by issuing warning letters to employee Murray Buckingham and placing him on probation, because he supported the Union and testified at the prior Board proceeding; (3) it violated Sec. 8(a)(5) by unilaterally creating a new bargaining unit position without affording the Union notice or an opportunity to bargain; and (4) it violated Sec. 8(a)(5) by refusing to bargain over the terms and conditions of employment for the newly created bargaining unit position.

among unit members and to unilaterally determine employee terms and conditions of employment. We believe this conduct bolsters our finding that the Respondent was not negotiating in good faith.

In sum, after reviewing the Respondent's behavior at the bargaining table and away from the table, it is clear to us that the Respondent was merely continuing the same course of bad-faith bargaining it had been found guilty of in the prior Board proceeding. We recognize that the negotiations resulted in movement and agreement on some subjects, but the totality of circumstances convinces us that the Respondent was not negotiating in good faith with a view toward reaching complete agreement with the Union.[4]

2. The judge also found that the Respondent violated Section 8(a)(5) of the Act by refusing to furnish the Union with information necessary to perform its collective-bargaining duties. In presenting its ''survey'' to the Union, the Respondent provided only an uncorrelated version of the data it gathered. The Respondent gave the Union the names of the ''competitors'' and the wage-and-benefit information gathered, but refused the Union's requests to advise it which ''competitor'' paid which level of wages and benefits. The judge concluded that the Respondent violated the Act by providing the Union with only a ''scrambled'' copy of the ''survey,'' i.e., by failing to correlate the name of each company with the data alleged to have been secured from it. We disagree for the reasons that follow.

An employer must provide a union, on request, with relevant information necessary to perform its collective-bargaining duties. *NLRB v. Acme Industrial Co*., 385 U.S. 432, 435–436 (1967); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). As we have found above, the ''survey'' was a sham creation, and the Respondent did not rely on the information contained in the ''survey'' in determining its bargaining position. It would be inconsistent to find that information compiled to deceive is necessary and relevant for intelligent bargaining and would assist the parties in their negotiations.[5] Accordingly, we conclude the ''survey'' was not relevant information, and we find the Respondent had no obligation to provide the sham document to the Union. Therefore, we dismiss the refusal-to-provide-information complaint allegation.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Coal Age Service Corporation, West Frankford, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

''(b) Refusing to bargain in good faith with its employees' designated bargaining agent for the appropriate unit of employees; unilaterally creating a new job position in the unit without notice to or opportunity for bargaining with the designated bargaining agent; and refusing to bargain in good faith over the terms and conditions of employment for the newly created bargaining unit position.''

2. Delete paragraph 1(c) and reletter the subsequent paragraph.

3. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that the certification year be extended 12 full months from the first bargaining session at which good-faith bargaining commences.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
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> To form, join, or assist any union
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> To bargain collectively through representatives of their own choice
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> To act together for other mutual aid or protection
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> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discriminate against our employees because of their activities on behalf of International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 483, AFL–CIO or any other labor organization by laying them off, issuing them warning letters, placing them on probation, or by any other adverse action with respect to their wages, hours of employment, or other terms and conditions of employment.

WE WILL NOT refuse to bargain in good faith with our employees' designated bargaining agent for the appropriate unit of employees; WE WILL NOT unilaterally create a new job position in the unit without notice to or opportunity for bargaining with the designated bargaining agent; and WE WILL NOT refuse to bargain in

[4] We shall revise par. 1(b) of the judge's recommended Order to reflect the bad-faith bargaining violation we find and the 8(a)(5) violations to which there are no exceptions.

[5] The Respondent's creation and use of the sham ''survey'' to deceive the Union are the basis of the general failure to bargain in good faith found above.

good faith over the terms and conditions of employment for the newly created bargaining unit position.

WE WILL NOT in any manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole Neal Heflin, whom we have recalled to work from unlawful layoffs, for any loss of earnings due him, plus interest.

WE WILL remove from the personnel files of Murray Buckingham and Neal Heflin any record of their warning letters, probation, and layoffs found to have been unlawful and notify them each in writing that no adverse personnel action will be taken against them in the future based on such records.

WE WILL, on the Union's request, rescind the job classification of inventory control clerk and bargain with the Union concerning terms and conditions of employment of such position until either agreement or impasse in bargaining before reestablishing such unit position.

WE WILL recognize and, on request, bargain in good faith with International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 483, AFL–CIO, as the designated exclusive bargaining representative of the employees in the following appropriate unit concerning wages, hours, terms, and conditions of employment and, if an understanding is reached, embody that understanding in a signed agreement:

> All full-time and regular part-time production and maintenance employees, including the inventory control clerk and truckdriver employed by the Employer at its West Frankford, Illinois facility, EXCLUDING office clerical employees, professional employees, guards, and supervisors as defined in the Act.

COAL AGE SERVICE CORPORATION

Mary J. Tobey, Esq., for the General Counsel.
Michael J. Bobroff, Esq., of St. Louis, Missouri, for the Respondent.
David M. Daniel, of East Alton, Illinois, for the Charging Party.

DECISION

HAROLD BERNARD JR., Administrative Law Judge. I heard these cases in St. Louis, Missouri, on February 24 and 25, 1992, following charges filed in November and December 1990, and in April, May, June, July, September, and November 1991 pursuant to which complaint issued November 13, 1991, alleging Respondent discriminatorily issued warning letters, placed an employee on probation, and laid off an employee because of employees' protected concerted and union activities, and because employees testified at a Board hearing; refused to bargain with the Union over the inventory control clerk as an included category in the bargaining unit, refused to furnish the Union with information requested by the Union which is relevant to the Union's representational duties, and in the course of the parties' collective bargaining that the Respondent insisted on regressive wage and other benefit proposals and failed to make meaningful concessions thereby manifesting a settled intention not to reach any agreement, thus failing to bargain in good faith, the above conduct violating Section 8(a)(1), (3), (4), and (5) of the Act.

Based on the entire record, including briefs filed by counsel for the General Counsel (General Counsel) and Respondent, as well as the witnesses' demeanor on the stand, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent does nonretail service and repair of coal mining and related equipment at its location in West Frankford, Illinois, for which services it receives over $50,000 annually from business enterprises located in Illinois, each of which satisfy other than a solely indirect standard for the assertion of Board jurisdiction. I find as admitted that Respondent is an employer engaged in interstate commerce as defined in the Act, and that the Union is a labor organization as defined therein.

II. THE UNFAIR LABOR PRACTICES

Absent the filing of exceptions thereto, the Board adopted the decision by Administrative Law Judge Thomas R. Wilks issued on March 1, 1991, that Respondent failed to bargain in good faith with the Union since July 16, 1989, ''by engaging in regressive bargaining . . . for the purpose of avoiding a collective bargaining agreement'' thereby violating Section 8(a)(5) of the Act. *Coal Age Service Corp.*, Cases 14–CA–20381, 14–CA–20535, and 14–CA–20621, JD–53–91. That decision found that Respondent also violated the Act by the discriminatory and unilateral reduction of an employee's wage rate and by laying off employee Neal Heflin because of his activities on behalf of the Union (supra ALJD pp. 21–22). The present case arises with the above findings serving where appropriate as a background for viewing the latest complaint allegations.

Layoffs of Neal Heflin

The prior case held Respondent laid off Heflin unlawfully on November 17, 1988, until March 21, 1988, because of his activities on behalf of the Union. Respondent had also laid Heflin off on two prior occasions which actions both led to unfair labor practice charges which settled, and, as Judge Wilks observed, as to those two cases ''no unlawful past conduct can now be inferred.'' (Supra, p. 9.) At the hearing before me the General Counsel alleged in her complaint that Respondent laid Heflin off on December 7, 1990, recalled him in January 1991, and then laid him off again on April 9, 1991, only to recall him yet again on April 22, 1991; and that Respondent took this action, ''because employee Heflin was a discriminatee in previous Board cases, gave testimony to the Board in the form of affidavits and testified at an unfair labor practice hearing in Cases 14–CA–20381 and 14–CA–20535.'' (G.C. Exh. 1(jj) par. 5(J).) She specifically alleges in this complaint at paragraph 10 that by the described

conduct Respondent violated Section 8(a)(1), (3), and (4) of the Act. Respondent amended its answer at the hearing before me to admit as being true all these complaint allegations regarding employee Heflin and I therefore find such violations established.

The Warning Letter and Probation Given to Employee Murray Buckingham

The complaint alleges Respondent also violated Section 8(a)(1), (3), and (4) of the Act by issuing employee Murray Buckingham a warning letter and placing him on probation on October 31, 1990, as well as by issuing him a second warning letter on March 25, 1991, based on alleged deficiencies in his work performance. Respondent stipulated at this hearing that the above-disciplinary action against Buckingham, its most senior bargaining unit employee with 10 years of service, was the result of observation and not records and documents.

Buckingham's work is welding in repair or fabrication of mining equipment. He started working for Respondent 1 month after the business opened in 1980. He has served as a union shop steward and a member on the Union's bargaining committee since mid-1988, and was present as a witness at the 1988 unfair labor practice hearing then, although not testifying. At the next hearing in May 1990, Buckingham sat at the General Counsel's table—the sole employee there—for the entire week, and was a main witness called by her to support the allegation in the complaint therein concerning Respondent's unlawful layoff of Neal Heflin. Judge Wilkins' decision noted inter alia: ''It is Buckingham's uncontradicted testimony that Willis (Respondent's president and chief operating officer, Earl Willis) without even inspecting those welds, admonished Buckingham for allowing Heflin to weld and, out of hand, rejected Buckingham's attempted explanation that Heflin was capable to perform welding tasks.'' (Supra, JD slip op. at 10, pars. 46–48.) This testimony clearly contributed to the decision against Respondent on this issue and was against Respondent's interest, tending to show a motive for Respondent's later action against Buckingham.

In mid-September 1990 Earl Willis, Respondent's president and chief operating officer, met Buckingham in the Respondent's shop and talked to him alone, telling Buckingham his intention to recall an employee, Duane Grogan, back to work. Bearing in mind a union–respondent agreement on layoffs and recalls, as well as longstanding practice wherein seniority qualifications governed, Buckingham said that was fine so long as all the welders on layoff were recalled, and Willis responded that he planned on calling back Gene Mayes and Jose Mendoza, but did not mention Carl Leber, a member with Buckingham on the union bargaining committee whom Buckingham considered to be a welder. When Willis said that Leber was not a welder Buckingham pointed out that Willis had him on the seniority list as a welder, paid him as a welder, and Leber welded daily prior to his layoff. The subject changed then, when Willis said, ''*You know . . . you've cost me thousands and thousands of dollars over this union business*.'' (Emphasis added.) Buckingham recalls Willis then said, ''this conversation never existed between you and I and he said I run this place and don't you ever forget it, [and] I said fine.'' Buckingham then said he had not cost the company money and that if it was losing any money it wasn't his fault—that his only concern has been to see the company prosper, whereupon Willis told him he didn't believe him.

On October 31, 1990, without prior warning Respondent summoned Buckingham to a meeting with President Earl Willis, Plant Manager Wayne Willmore, and Foreman Dave Johns and Jeff Warren. Willis said, ''We need to talk to you about your work performance and your *attitude*. He said *we've been watching you now for the last two years* and your work performance is just not what it should be.'' (Emphasis added.) Willis went on to say, ''the other guys in the shop are busting their butts and you're just taking your sweet old time,'' and that Buckingham was taking entirely too much time to do the jobs assigned to him so that other guys in the shop were complaining and felt Buckingham should have to carry his load the way they do. Willis denied Buckingham's request to identify the employees who complained and went on to say that ''they'' accused Buckingham of deliberately taking more time than was required to do his work. When Buckingham attempted to offer an explanation as to the time required on a pillow block job Willis brushed aside the explanation merely commenting the employee would have to do better, and gave him a warning letter already prepared placing Buckingham on probation, accusing him of cheating on Respondent, warning him against a recurrence, and describing two jobs as specific examples in support of the action: work on a pillow block, and on mounting brackets. (G.C. Exh. 14.)

At this hearing Buckingham described without contradiction how the pillow block job required extra time ''a good hour'' to perform because of the need to first clean the shaft and seals before putting it on, unlike the usual situation when the shaft is clean enough to be used at once. He testified further to a specific job, in November 1, 1990, he identified by job order number on a pillow block where the work was being done by an employee named Ed Clanahan wherein the shaft was already cleaned, yet the job took 2 hours and 15 minutes on 1 block—whereas he had installed *2* blocks in 3 hours. Had the other employee taken 2 hours and 15 minutes to install the other block it would have taken 4-1/2 hours. Regarding the mounting bracket assignment Buckingham also testified without contradiction that Respondent was out of necessary parts of the correct size, requiring their fabrication by him and doubling the time consumed to complete the work beyond that normally involved. Employee Barry Marquis, a welder, testified, also without contradiction, that it normally took 1-1/2 hours to install a pillow block average, depending on its condition—that an unclean shaft, old or used, or one needing welding particles scraped off could take 3-1/2 hours, as he had sometimes required, to do such job without being warned about slowness. After being removed from probation on December 19, 1990, Willis told Buckingham he had improved immensely and the latter replied he hadn't been working any differently.

The Second Warning Letter

On March 25, 1991, Respondent issued another warning letter, again referring to Buckingham deliberately taking too much time on four job assignments. Yet at this hearing Buckingham credibly testified to extenuating circumstances that persuasively explain why the work took longer than Respondent says—in only purely general terms—it should have. The first alleged ''slow work'' occurred on a railcar job

which Buckingham worked on in November and December during the very period on probation wherein Willis paradoxically told him his work had *improved* immensely. Further, the Respondent, in assessing his work on the railcar in question compared it with another railcar job where the work needed to be done was not comparable work and thus not a reliable standard by which to compare Buckingham's elapsed working time. Moreover, though other employees were involved in the repair of the so-called unsatisfactorily long job completion, Respondent only disciplined Buckingham.

Revealingly, Respondent's second alleged ''slow work,'' welding on a motor mount, wasn't even performed by Buckingham; whose preparatory work burning off some parts was approved by supervision the day in question, Foreman Jeff Warren granting permission for Buckingham to burn off the parts one at a time since the parts were so large. The third alleged ''slow work'' took the time it did, according to Buckingham, because faster dual shield machines were already in use, he had to fabricate a guard for the fan and a set of covers; and had to lay out the installation without benefit of any blueprints. Respondent does not contest the truth of this explanation. Regarding the EICO tracks, the fourth example Respondent gave, it was Buckingham's first experience doing this sort of work and he admitted this caused some delay. Respondent's letter states it took him 5 hours to weld three such tracks whereas the letter stated, it takes 35 minutes each to weld them. (G.C. Exh. 16.) Buckingham's testimony shows that the wire on the welding machine ran out when he started work; that when he changed the wire the spool slipped and the wire punctured the vein in his wrist requiring medical attention at the hospital. The following day, slowed by the injury, he also confronted blocks on the tracks requiring more welding time than usual. Employee witness Marquis testified it takes him from between 50 minutes to an hour to do such welding per track *excluding* extra time if it is necessary to prepare the welder and cut the steel. Once again Respondent did not refute or question the plausible reasons for the employee's elapsed working time either to him or during its opportunity to do so at this hearing.

Respondent had never issued any warnings to Buckingham or placed him or any employee on probation for production-related reasons prior to the employee's well-known involvement with the Union as a shop steward, member on its bargaining committee and as a main witness for the General Counsel at a Board hearing concerning unfair labor practice allegations against Respondent wherein Buckingham gave testimony damaging to Respondent and in particular Respondent's president, Earl Willis. Only after such activity, well known by Willis, is Buckingham told by Willis that he has cost Respondent ''thousands and thousands of dollars over this union business.'' A statement reasonably interpreted to include within the purview of the terms ''union business'' both Buckingham's open support for the Union as steward and on the bargaining committee as well as his support for the Union's charges as a witness in the hearing on the complaint arising form the Union's charges. Willis, of course, made no differentiation per se but, since there were no new ''costs'' to Respondent from any collective-bargaining agreement—based on increased employee wages or other benefits, at that time it would be surmisable that Willis was referring, at least, in part, to the ''costs'' of defending in litigation before the Board the complaint allegation that Buckingham's testimony supported.

The evidence of Respondent's knowledge of Buckingham's activities in both these regards, and its animus toward the employee based thereon, is augmented by the clearly unfounded, and unpersuasive reasons it advances for the two warning letters and unprecedented allegedly work-related probation of the employee as detailed above. Respondent brushed aside compelling justifiable circumstances as well as just plain error by its own supervision behind each of its accusations against Buckingham for alleged ''slow-work.'' To inform the employee that Respondent had been watching him for *2 years*, a period of time coinciding with Buckingham's protected activities confirms Respondent's animus further. This statement to Buckingham thus is either an exaggeration way beyond truth casting grave doubts on Respondent's bona fides behind the action against the employee or a significant indication that its reasons for such actions were based on unlawful considerations.

I conclude the General Counsel has established sufficient evidence, a prima facie case, that Respondent unlawfully warned and placed on probation this employee for the impermissible reasons noted above his protected activities. Since Respondent, I find, has failed to carry its resulting burden of proof that it would have acted against him as described even apart from such activities, I find Respondent violated Section 8(a)(1), (3), and (4) of the Act. *Wright Line*, 251 NLRB 1083 (1980).

The Inventory Control Clerk

The Union became certified bargaining representative on April 10, 1989, for a unit of:

> All full-time and regular part-time production and maintenance employees and truckdrivers employed by respondent at its Whittington, Illinois facility, excluding office clerical and professional employees, guards and supervisors as defined in the Act.

The parties stipulated that following its move from Whittington to a new location 20 to 25 miles away in West Frankford, Illinois, in 1990 the Respondent voluntarily continued to recognize the Union as the bargaining representative of its employees.

After making the move, Respondent's president, Earl Willis, created the position of inventory control clerk, designated laborer employee Stewart Hungate for the position, and drafted a job description outlining his duties on September 13, 1990. (R. Exh. 2.)

While a laborer employee at Whittington and West Frankford, Hungate was included in the bargaining unit. The new job description involves responsibility for keeping track of parts and supplies out in the plant under the shop supervisor. Hungate is hourly paid, punches a timeclock, shares the same benefits as other unit employees, works under the same supervision as other employees in the unit, and spends 20 to 50 percent of his time performing production and maintenance duties when not in the plant parts office or warehouse. His job description requires him to check with the shop supervisor on what supplies are needed before giving the purchasing agent a list of items. There is no evidence that he has any supervisory or managerial duties whatsoever

and the testimony of employee witnesses makes clear that they regularly pick up parts they need in Hungate's absence from the vicinity of the parts area or his office when, as regularly occurs he is performing production and maintenance work. I find that Hungate's duties and benefits are akin to those of a plant clerical employee sharing a community of employment interests with the production and maintenance employees and that the job classification of inventory control clerk is an accretion to the unit in which Hungate was at all material times included. *Weyerhauser Co*., 173 NLRB 1170 (1968); and *Armour & Co*., 119 NLRB 623 (1957).

During a bargaining session on May 21, 1991, shop steward and bargaining committee member Murray Buckingham noticed that Hungate's name was missing from a seniority list the parties were discussing, in a context of bargaining for a new contract, and asked why. Respondent's chief negotiator, a labor consultant, Kenneth Carroll answered because Hungate was not in the bargaining unit. Union business representative and the local union's president, David Daniel, testified without denial or any countervailing evidence whatsoever that this was the first time he had heard about Hungate and indicated at this hearing he only learned about Hungate's clerking position for the first time on May 21, 1991. It was Respondent's duty under established Board law to inform the Union as collective-bargaining representative of its employees concerning its decision to create a new bargaining unit classification in advance of the decision and implementation of same so as to accord the Union notice and an opportunity to bargain about the decision and its impact on unit employees. This the Respondent did not do, and I find that Respondent thereby violated Section 8(a)(5) of the Act.

Although he took the stand and testified concerning other matters, Carroll never denied the corroborated testimony by Buckingham and Daniel that Respondent refused to bargain over Hungate's terms and conditions of employment by taking the position that Hungate was not included in the bargaining unit during negotiations on May 21, 1991. By doing so, Respondent compounded its unlawful conduct in creating the inventory control clerk position unilaterally to begin with and further violated its duty to bargain over employment conditions for unit employees in contravention of Section 8(a)(5) of the Act.

Respondent's Refusal to Provide Information

During the course of the parties' bargaining for an agreement Respondent, according to its president and chief operating officer, Earl Willis, took the position that it had to secure a reduction in the current wages and benefits paid to its employees in order to remain competitive. Willis made this decision on the Union's becoming certified, he said, out of concern that Respondent would become locked into (a contract established wage and benefit cost) with no opportunity to reduce such costs if required by competition, which competition he testified he checked, and found that Respondent ''paid more'' than they did therefore requiring a reduction in Respondent's employees benefits. Prompted by what he termed the need ''to justify our requested concessions,'' Respondent surveyed 10 alleged competitors and compiled a list containing benefits paid to such companies' employees under circumstances allegedly requiring that the identity of the companies remain confidential.

At the parties' bargaining session on May 16, 1991, Union Business Manager David Daniel recalled that there had been talk at that time of Respondent getting a competitive position and (its) need for a reduction in wages. Daniel and Respondent's labor consultant, Ken Carroll, discussed who the competitors were and Carroll promised a list would be provided at the next meeting with the companies' wages and benefits, etc. that would pertain to negotiating a contract with Respondent. The Union's International representative, Charles Fuchs, asked for various items to be included on the list such as he would like to see the wages, their benefits, and things that would pertain to the parties' negotiations, including open items—that would be affected by a list of that nature.

On May 21, 1991, Carrol presented the list to the Union as its response to the Union's earlier request on May 16. (G.C. Exh. 7.) The list contained itemized wage and benefit data concerning 10 companies on one side of the paper, and the names of the companies on the other side with no connective correlation between the two, so that the information contained as to wages and benefits could not be attributed to its source company. Fuchs complained over the scrambled information arising from the inadequate identification of companies, and Carroll said Respondent did not have to give the Union the competitors as such; and further, that it was confidential between the Company and those firms. There was talk and disagreement over why a company like Joy Technology was left off the list, a company the Union had a contract with and believed was also a competitor to Respondent, and questions were raised by the Union regarding the competitive positions of some companies on the list. Fuchs asked the Company to give the Union, ''something in order [connected to each company] so the Union could understand the list'' and whether Respondent was going to make a serious offer. Carroll replied he'd make one that was competitive as the Company wanted to get with a competitive mode, a concern he repeated during the parties' meeting on August 6, 1991, when Respondent proposed a 50-cent-an-hour wage cut Carroll justified by the remark that it was for competitive reasons.

As has been stated and quoted before,

> It is well settled that an employer has a statutory duty to provide a union, on request, with relevant information the union needs for the proper performance of its duties as a collective-bargaining representative. *NLRB v. Acme Industrial Co*., 385 U.S. 432, 435–436 (1967); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). In determining whether an employer is obligated to supply particular information the question is only whether there is a ''probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.'' *NLRB v. Acme Industrial Co*., supra at 437. As the Supreme Court has stated, the disclosure obligation is measured by a liberal ''discovery-type standard,'' not a trial-type standard, of relevance. Ibid. Where the requested information deals with information pertaining to employees in the unit which goes to the core of the employer-employee relationship, said information is ''presumptively relevant.'' *Shell Development Co. v. NLRB*, 441 F.2d 880 (9th Cir. 1971). Where the information is presumptively relevant, the employer has

> the burden of proving lack of relevance. *Prudential Insurance Co. [v. NLRB]*, 412 F.2d 77 (2d Cir. 1969). ''But where the request is for information with respect to matters occurring outside the unit, the standard is somewhat narrower . . . and relevance is required to be somewhat more precise. . . . The obligation is not unlimited. Thus, where the information is plainly irrelevant to any dispute there is no duty to provide it.'' *Ohio Power Co*., 216 NLRB 987, 991 (1975); *Doubarn Sheet Metal*, 243 NLRB 821, 823 (1979). Thus, where the requested information deals with matters outside the bargaining unit, the union must establish the relevancy and necessity of its request for information. *San Diego Newspaper Guild Local 95 v. NLRB*, 548 F.2d 863 (9th Cir. 1977).
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> In *General Electric Co*., 188 NLRB 920 (1971), the Board held that the employer was obligated to furnish the union with all the information requested upon which the employer relied including a comparative wage survey of the employer's competitors. See 188 NLRB at 921.

Mobil Exploration & Production, 295 NLRB 1179, 1180 (1989).

It is clear that given Respondent's admitted reliance on the survey of its competition demonstrating, it alleged, that it needed wage and benefit reductions in any contract with the Union in order to stay competitive, that such information was clearly relevant to the Union's proper performance of its duties as a collective-bargaining representative. This list was the very core of the Respondent's position as admitted by its president. Respondent therefore was obligated to provide sufficient information on this subject, which it secured in the form of a written survey, pursuant to the Union's request. It is readily apparent that the information given to the Union in the form of a scrambled survey withholding the identity of the company from the data alleged to have been secured from it prevented the Union from verifying its accuracy and was therefore incomplete and inadequate to the Union's performance of its bargaining duties. The issue of identification was closely related as well to the issue of whether the data was or was not germane, that is whether the companies shown were fairly reflective or representative of the Respondent's operation, composition of its work force, and the type of work performed. Further, the parties became embroiled in dispute over the nature of the companies—whether they were truly competitive or not; and whether more companies should have been on the list. These issues could have been reconciled to the betterment of the parties bargaining efforts had Respondent provided that nexus information.

Regarding the Respondent's claim of confidentiality, the evidence in support of this contention was purely hearsay attributions by Respondent witnesses as to what the alleged competitor company officials said to them and under what circumstances those conversations occurred. Since such hearsay testimony was offered by Respondent to prove its own defense I consider it unreliable hearsay untested by cross-examination and do not rely on it. Respondent failed to establish that it promised anonymity to the companies on the list or attempted to accommodate its concerns and its bargaining obligation even if it did. *Fairmont Hotel*, 304 NLRB 746 fn. 3 (1991). In any event, the parties may bargain regarding the conditions under which the information may be protected from unauthorized viewers. *Mobil Exploration & Production*, supra at 1181; *E. I. Dupont & Co*., 276 NLRB 335, 336 (1985). I find that Respondent violated Section 8(a)(5) of the Act by refusing the Union's request for information regarding the identity of the competitors matched with the data in Respondent's wage and benefit survey. *A.M.F. Bowling Co*., 303 NLRB 167, 169 (1991), wherein the Board stated, ''the Board has consistently required employees to provide any wage surveys on which they have relied in the formulation of the bargaining proposals when the Union requests such information.'' Respondent's production of a wage survey in scrambled and insufficient form does not in my view satisfy its obligation under Board law for the reasons stated.

Respondent's Failure to Bargain in Good Faith

In his March 1991 decision adopted by the Board cited above, Judge Wilks concluded, inter alia, that during some 30 contract bargaining sessions attended by the Union and Respondent and held between May 2, 1988, and April 13, 1990, ''[this] Respondent violated Section 8(a)(1) and (5) of the Act by taking an intransigent position in bargaining for regression in the employees' existing wage benefits structure for the purpose of frustrating a collective bargaining agreement.'' Supra at 168.

The complaint before me alleges that during the later ensuing period between May 16, 1991, and during nine more contract bargaining sessions between the same parties, the last on February 17, 1992, Respondent continued its failure to bargain in good faith by still further insistence on reduction in employees' wages and benefits, elimination of certain benefits and by refusing to make meaningful concessions regarding union contract proposals, the conduct being designed to frustrate negotiations and preclude reaching an agreement with the Union.

The record fully supports these allegations, for it shows that Respondent was undeterred by the Board's Order following the earlier decision and continued a clear identical pattern of conduct in bargaining for regression in the employees' existing wage and benefit structure in the latest set of negotiations between May 1991 and February 1992 now under judicial scrutiny.

The parties met on June 13, 1990, where the Respondent rejected the Union's proposal for union security and checkoff prompting a counter by the Union to allow current employees to come under such clauses while new employees would have their choice. Respondent still rejected the offer of any such proposal, its representative stating it did not believe the Union had enough support to warrant the clause, without making any counterproposal. On May 16, 1991, Respondent proposed extending the employee probationary period from 45 to 180 days and withdrew its agreement with the Union, reached on the same topic on May 21, 1991, allowing greater rights to employees to avoid overtime assignments based on seniority proposing instead a more involuntary system for such assignments. Respondent, also during the meeting, talked about securing wage reductions to remain competitive.

On May 21, 1991, Respondent sought to restrict employee holiday pay benefits by requiring employees to work both the day before and after such holidays to be eligible for payment, while under the existing benefit there was only a requirement of working either the day before or after. At the

meeting on June 11, 1991 (corrected by witness Daniel to July 2, 1991), Respondent continued to maintain a regressive posture, proposing that employee medical care insurance benefits be substantially cut by eliminating any employee dependent care coverage from the employer-funded plan then in existence, so that employees would have to pay for such coverage themselves. Since Labor Consultant Carroll based such proposal on what he termed rising costs, the Union countered with a proposal that the parties stay with the present coverage but the Union would pay any increase in the cost of such benefits arising in the future. Unaccountably Carroll rejected the proposal. Later on February 17, 1992, the Respondent, with the Union's agreement put a policy in force with dependent coverage due to savings for Respondent over the costs of the present plan. However, again raising a serious question about its bona fides in these negotiations, Respondent Attorney Michael Bobroff, with witness Daniel, union business agent on the stand concurring in his understanding, stated that as far as any new contract with the Union was concerned Respondent's position was the same, that is, that Respondent wants the employees to pay for dependent coverage. The fact that Respondent found a plan *with* dependent coverage—other than the existing plan—at a savings to Respondent, yet insisted that any new contract with the Union exclude the employees' existing benefit of dependent care coverage belies any real concern over costs, casts suspicion over its outright rejection of the Union's offer to shoulder increased costs for such coverage, and suggests a regressive bargaining designed to frustrate, in one more of many ways, the reaching of an agreement with the Union.

On July 2, 1991, Respondent proposed stripping employees' rights to file grievances concerning Respondent's determination of qualifications for layoff and recall purposes contrary to an earlier understanding with the Union. (G.C. Exh. 9.) While dropping its proposal later, the regressive proposal necessarily detracted from efforts by the Union to secure an agreement and Respondent's proposal throughout the sessions made no mention of an employee pension plan.

It is clearly the case that Respondent never made any offer concerning the wage rates to be included in a contract other than to propose reductions in employee current wages. Labor Consultant Carroll testified that from the beginning, after the Union proposed 50-cent-an-hour increases for each of 3 years, then dropped its proposals to zero, 50 cents, 50 cents, the Respondent's only proposals have been to reduce the existing employee wages, from $2-an-hour decreases, then $1.50, then in April 1990 to $1, and most recently to a 50-cent-an-hour decrease proposal in August 6, 1991. The Union even proposed that it would agree that Respondent could set whatever starting wage rate it wanted for new employees and that current wage rates would remain the same but Carroll refused the offer citing the need to remain competitive.

Employee Buckingham testified without denial there had never been a general wage cut in the history of the Company. Significantly, it was Respondent's professed need to remain competitive which served as the basis for its continuing insistence on reducing employee wages and benefits, yet Respondent failed to support such claim by the wage survey it purportedly relied on to justify such posture in negotiations with the Union, a survey which Respondent's owner admitted contained the names of companies he was not even sure were Respondent's competitors.

The General Counsel aptly notes in brief the following appropriate summary of Board law set forth in *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984), and quoted in *Brannan Sand & Gravel Co*., 289 NLRB 1492, 1500 (1988):

> The Board has summarized certain general requirements of good-faith bargaining in *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984), as follows:
>
> > Under Section 8(d) of the Act, an employer and its employees' representative are mutually required to ''meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of concession.'' Both the employer and the union have a duty to negotiate with a ''sincere purpose to find a basis of agreement,''[1] but ''the Board cannot force an employer to make of a concession'' on any specific issue or to adopt any particular position.''[2] The employer is, nonetheless, ''obliged to make some reasonable effort in some direction to compose his differences with the union, if (a)(5) is to be read as imposing any substantial obligation at all.''[3]

The administrative law judge, whose decision in *Brannan* was adopted by the Board further stated as follows:

> The foregoing clearly enunciates the Board's role in cases of this nature, namely, to ascertain whether the parties are making a sincere effort to find a basis of agreement by making some reasonable effort in some direction to resolve their differences. Any rational employer must necessarily understand that its refusal to agree to an increase in wages or benefits operates as an impediment to the culmination of an agreement; that its insistence on reducing those wages or benefits that the employees have previously enjoyed makes the negotiation of an agreement highly unlikely unless the employer can convincingly demonstrate that economic necessity mandates such reduction to provide continued employment; that, absent economic necessity, its withdrawal of significant terms and conditions of employment, which the employees have enjoyed and relied on over extended periods of time, and which provide for job security during their employment and economic security thereafter, virtually mandates that no agreement will be reached; and that its total negation of each and every significant contract provision and its insistence that it maintain total control over each aspect of the employment relationship absolutely precludes, beyond a shadow of a doubt, the reaching of an agreement, as no self-respecting union will execute such a document. Thus it is crystal clear that the Respondent, from the very inception of bargaining, could not have harbored

[1] *NLRB v. Herman Sausage Co*., 275 F.2d 229, 231 (5th Cir. 1960).

[2] *NLRB v. Reed & Prince Mfg. Co*., 205 F.2d 131, 134 (1st Cir. 1953), cert. denied 346 U.S. 887 (1953).

[3] Id. at 135.

> the slightest hope that its initial contract proposals, from which it did not deviate in any significant respects throughout the entire course of bargaining, would ever be acceptable to the Union.

It is evident from Respondent's regressive bargaining to reduce employee wages and benefits, water down their rights in any future contract, eliminate benefits currently enjoyed, failure to make concessions, commission of contemporary unfair labor practices discriminating against employees because of their union activities and testimony at Board hearings—as well as unlawful unilateral changes in their employment conditions, refusal to provide relevant information to the Union, and unlawful refusal to bargain about a unit employees' terms of employment that Respondent was bent on a course of conduct, when viewed in its totality, which clearly violated its duty to negotiate with a sincere purpose to find a basis for agreement and was aimed instead at avoiding any contractual relationships with the Union.

Accordingly, I find Respondent failed to bargain in good faith with the Union for the reasons noted above, thereby violating Section 8(a)(5) of the Act. *Harrah's Marina Hotel & Casino*, 296 NLRB 1116 (1989); *Mooresville IGA Foodliner*, 284 NLRB 1055 (1987); *Palestine Bottling Co*., 269 NLRB 639 (1984); and *Hedaya Bros*., 277 NLRB 942 (1985).

CONCLUSIONS OF LAW

1. The following employees of Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(c) of the Act:

> All full-time and regular part-time production and maintenance employees, including the inventory control clerk and truckdriver employed by Respondent at its West Frankford, Illinois facility, EXCLUDING office clerical employees, professional employees, guards, and supervisors as defined in the Act.

2. Since about December 15, 1987, and at all times material here, the Union has been the designated exclusive collective-bargaining representative of the unit and since about March 9, 1988, the Union has been recognized as such representative by Respondent. On April 10, 1989, the Union was certified as the exclusive collective-bargaining representative of the unit.

3. At all times since December 15, 1987, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

4. Respondent has engaged in unfair labor practices which affect commerce within the meaning of the Act as found above in this decision by:

(a) Laying off employee Neal Heflin on December 7, 1990, and again on April 9, 1991, because of his protected activities supporting the Union and because he testified in a Board hearing thereby violating Section 8(a)(1), (3), and (4) of the Act.

(b) Issuing warning letters on October 31, 1990, and March 25, 1991, to employee Murray Buckingham and placing him on probation on October 31, 1990, because he supported the Union and because he testified at a Board hearing thereby violating Section 8(a)(1), (3), and (4) of the Act.

(c) Unilaterally creating the new position of inventory control clerk in the unit without affording the Union notice or an opportunity to bargain thereby violating Section 8(a)(1) and (5) of the Act.

(d) Refusing to bargain over the terms and conditions of employment governing the position of inventory control clerk on May 21, 1991, thereby violating Section 8(a)(5) and (1) of the Act.

(e) Refusing to furnish the Union on request with relevant information contained in a wage and benefit survey on and after May 21, 1991, in violation of Section 8(a)(5) and (1) of the Act.

(f) Continuing to refuse and fail to bargain in good faith with the Union since the inception of the parties' bargaining, including the negotiations reviewed here beginning June 13, 1990, by engaging in regressive bargaining with respect to wages, benefits, and terms and conditions of employment and by tactics described above in the body of this decision designed to frustrate and forestal reaching any collective-bargaining agreement with the Union, thereby violating Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that the Respondent has engaged in violations of Section 8(a)(1), (3), (4), and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the polices of the Act, including an order that it bargain in good faith with the Union during a 12-month certification year to commence with the first bargaining session at which Respondent bargains in good faith. *Mar-Jac Poultry Co*., 136 NLRB 785–786 (1962); *Van Dorn Plastic Machinery*, 300 NLRB 278 (1990).

Having found that Respondent unlawfully laid off employee Neal Heflin, I recommend that Respondent be ordered to make him whole for any loss of earnings suffered as a result of its unlawful conduct by payment of a sum equal to that which he would have earned absent the discrimination with backpay to be computed in the manner set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), and with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall also recommend that Respondent be ordered to rescind its unilateral action creating the position of inventory control clerk and bargain with the Union thereto on request.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Coal Age Service Corporation, West Frankford, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Discriminating against its employees because of their activities on behalf of International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 483, AFL–CIO or any other labor organization by laying them off, issuing warning letters, placing them on probation or by any other adverse action with respect to their wages, hours of employment, or other terms and conditions of employment.

(b) Refusing to recognize and bargain in good faith with its employees' designated bargaining agent for the appropriate unit of employees including the inventory control clerk by insisting on a regression in wages, benefits, and/or other conditions of employment for the purpose of avoiding a collective-bargaining agreement or by unilaterally creating a new job position in the unit without notice to or opportunity for bargaining with their designated bargaining agent.

(c) Refusing to furnish the Union with requested information concerning the identity of the competitors contained in the wage and benefit survey.

(d) In any manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole Neal Heflin for any loss of earnings that may be due to him in the manner set forth in the remedy section of this decision.

(b) Remove from the personnel files of Murray Buckingham and Neal Heflin any records of their warning letters, probation, and layoffs described here and notify them in writing that no adverse personnel action will be based on such records in the future.

(c) On the Union's request rescind the job classification of inventory control clerk and bargain with the Union concerning terms and conditions of employment of such position until either agreement or impasse in bargaining before reestablishing such position.

(d) Recognize and, on request, bargain in good faith with International Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers, Local 483, AFL–CIO as the designated exclusive bargaining representative of the employees in the following appropriate unit concerning wages, hours, terms and conditions of employment and, if an understanding is reached, embody that understanding in a signed agreement:

> All full-time and regular part-time production and maintenance employees, including the inventory control clerk and truckdriver employed by Respondent at its West Frankford, Illinois facility, EXCLUDING office clerical employees, professional employees, guards, and supervisors as defined in the Act.

(e) Give advance notice to and bargain in good faith with the Union about any future change of the bargaining unit composition.

(f) Post at its West Frankford, Illinois place of business copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the certification year be extended 12 full months from the first bargaining session at which good-faith bargaining commences.

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[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''